UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACKIE LEE SESSIONS, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	)	No. 20861

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, Southern Division, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On January 31, 1957, appellant Jackie Lee Sessions pled guilty to a charge of violating California Penal Code section 211 (robbery). (See EXHIBIT "A"

attached hereto and incorporated herein as though fully set out.) Appellant did not appeal his conviction (CT 30).[1/]

Appellant was represented by counsel throughout all critical stages of the judicial process (Exhibit A). Appellant's petition for a writ of habeas corpus, filed in the California Supreme Court, was denied on September 2, 1965 (CT 5-6).

B. Proceedings in the Federal Courts.

On January 13, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1). On January 13, 1966, the District Court issued an order denying the petition (CT 30). Appellant applied for a certificate of probable cause on February 3, 1966 (CT 34). An order granting the certificate of probable cause and granting appellant's motion to proceed in forma pauperis was issued on March 1, 1966 (CT 5).

SUMMARY OF APPELLEE'S ARGUMENT

I. The Escobedo rule should not be applied retroactively to appellant's conviction which became final prior to the date of that decision.

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1. The initials "CT" as used herein refer to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.

II. Appellant's plea of guilty forecloses collateral attack upon his conviction upon the grounds that it resulted from illegally obtained evidence.

III. Appellant was represented by counsel in all critical stages of the proceedings.

ARGUMENT

I

THE ESCOBEDO RULE SHOULD NOT BE APPLIED RETROACTIVELY TO APPELLANT'S CONVICTION WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION.

Appellant seeks to upset his conviction by urging that the exclusionary rule of Escobedo v. Illinois, 378 U.S. 478 (1964), should be applied retroactively.

Judgment of conviction was entered against appellant on January 31, 1957 (Exhibit A). He did not appeal. Escobedo was decided on June 22, 1964. Thus, appellant's conviction necessarily became final long before the decision was rendered in Escobedo. The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965), that Escobedo is not to be applied retroactively. The District Court below rejected appellant's contention based upon Escobedo solely upon the authority of Carrizosa. The Carrizosa

brief is before this Court (No. 20304), and the issue of retroactivity of Escobedo has been extensively briefed therein by the California Attorney General's Office. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal and a copy has been served upon appellant. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and we submit, completely disposes of appellant's contention in this regard. The District Court therefore properly rejected those contentions.

Moreover, appellant's voluntary plea of guilty forecloses any consideration of his claim. Appellant's extrajudicial statements were not used to convict him; his conviction was based upon his plea of guilty. Townsend v. Burke, 334 U.S. 736 (1948); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651 (1964). In the Harris case, this Court said:

> "By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its

introduction, if made and overruled by the trial court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. Eberhart v. United States, 9 Cir., 1958, 262 F.2d 421 * * * The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. United States v. French, 7 Cir., 1960, 274 F.2d 297; United States v. Sturm, 7 Cir., 1950, 180 F.2d 413; Kinney v. United States, 10 Cir., 1949, 177 F.2d 895." Harris v. United States, supra at 80.

II

APPELLANT'S PLEA OF GUILTY FORECLOSES COLLATERAL ATTACK UPON HIS CONVICTION UPON THE GROUNDS THAT IT RESULTED FROM ILLEGALLY OBTAINED EVIDENCE.

Appellant next contends that he was subjected to an unreasonable search and seizure and that illegally obtained evidence was used against him. Again, appellant's voluntary plea of guilty forecloses any consideration of his claim. Even assuming the evidence was illegally seized, such evidence was not used to convict him; his

conviction was based on his plea of guilty. Townsend v. Burke, supra; Davis v. United States, supra; Harris v. United States, supra; In re Seiterle, supra.

Even if appellant's decision to plead guilty was influenced by the allegedly illegally obtained evidence, the federal courts have consistently held that such a claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (10th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 38 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Kniess, 264 F.2d 253 (7th Cir. 1959), cert. denied, 359 U.S. 947; Waley v. Johnston, 139 F.2d 117 (9th Cir. 1944), cert. denied, 321 U.S. 779.

III

APPELLANT WAS REPRESENTED BY COUNSEL IN ALL CRITICAL STAGES OF THE PROCEEDINGS.

Appellant next contends that his conviction should be reversed because he was not represented by counsel in all stages of the proceedings.

Appellant alleges that he was not represented by counsel at the preliminary examination (CT 31). However, as pointed out by this Court in Wilson v.

Harris, 351 F.2d 840 (9th Cir. 1965), the preliminary examination is not a critical stage in the proceedings so as to constitutionally require appointment of counsel. The record does show that appellant was represented by counsel both at trial and at the time of sentencing. (Exhibit A.)

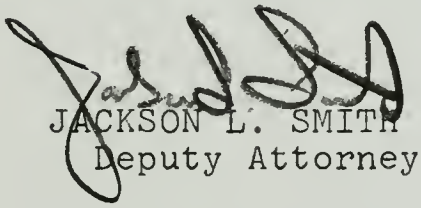
CONCLUSION

For the reasons stated it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: MAY 10, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



JACKSON L. SMITH
Deputy Attorney General

Attorneys for Respondent-Appellee.

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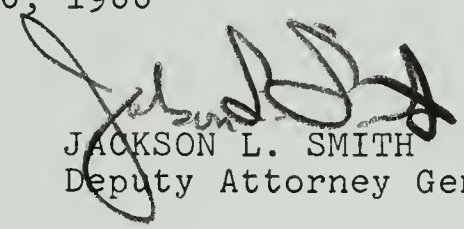
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: MAY 10, 1966



JACKSON L. SMITH
Deputy Attorney General

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C. I. M.

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G.C.ADMITTANCE

DEPT. No. 3 CASE NO. 7900

VERA R. GIBSON, CLERK
KERN COUNTY, CALIF.
BY

FEB 1 10 AM '57

BOOK
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FILED

In the Superior Court of the State of California

IN AND FOR THE ..... COUNTY OF KERN

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

Defendant.

Jackie Lee Sessions

Hon. W. L. Bradshaw
(Judge of Superior Court)

Entered ☑ Kit Nelson
Fee ☐
(District Attorney)

Jack B. Hislop
(Counsel for Defendant)

This certifies that on the 31st day of January, 19 57 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 7900 Count No. One he was convicted by Court (Court or Jury); on his plea of Guilty as Charged (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Felony, to wit: Robbery in the 1st degree

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that effects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of Section 211 of the Penal Code
(reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows: None

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

CA-76 (11627)

EXHIBIT A

Defendant ....was not.... (was) or (was not) ....adjudged a habitual criminal within the meaning of Sub-division a or b (a) or (b) .. of Section 644 of the Penal Code; [redacted] (is) or (is not) of [redacted]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California, for the term provided by law, and that he be remanded to the Sheriff of the ..... County of .....Kern..... .....and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows..... (Note whether concurrent or consecutive as to each count):

.....

.....

.....

.....

and in respect to any prior incompleted sentence (s) as follows:.....concurrently if any..... (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

.....

.....

.....

.....

To the Sheriff of the..... County of.....Kern..... and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at The California Institution for Men at Chino, California at your earliest convenience.

Witness my hand and seal of said court

this 31st day of January, 1957

VERA K. GIBSON ..... Clerk

by ..... Deputy

SEAL

State of California, } ss.
County of Kern }

I do hereby certify that the foregoing to be a true and correct abstract of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213

Attest my hand and seal of the said Superior Court this 31st day of January ..... 1957 .

VERA K. GIBSON By ..... Deputy Clerk
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the County of Kern

The Honorable W. L. Bradshaw
Judge of the Superior Court of the State of California, in and for the County of Kern

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

P. C. Stanton
County Clerk
Kern Co.
2-14-57